Petition

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No. 81-1122

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MILLARD C. FARMER, JR.,
Petitioner,

v.

NOAH J. STRICKLAND, Sheriff of
Pierce County, Georgia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B

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QUESTION PRESENTED FOR REVIEW

The Court should grant certiorari to consider whether petitioner, an attorney, was deprived of due process of law, as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by being summarily adjudicated in criminal contempt of court on a preponderance of the evidence rather than on evidence which established his guilt beyond a reasonable doubt for objecting to racially derogatory treatment of his client in the courtroom.

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IN THE
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October Term, 1981

No.

MILLARD C. FARMER, JR.,

Petitioner,

v.

NOAH J. STRICKLAND, Sheriff of
Pierce County, Georgia,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, UNIT B

Petitioner, Millard C. Farmer, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, Unit B, which affirmed a judgment of the United States District Court for the Southern District of Georgia denying habeas corpus relief to petitioner.

OPINIONS BELOW

The opinion of the court of appeals, reported at 652 F.2d 427 (5th Cir. 1981), is printed in the Appendix to this Petition. A. 1a-54a. The opinion of the district court is unreported and is printed in the Appendix to this Petition. A. 57a-66a.

JURISDICTION

The court of appeals filed its opinion and entered its judgment on August 3, 1981. A copy of this judgment is printed in the Appendix. A. 55a-56a. On October 21, 1981, Mr. Justice Powell signed an order extending the time within which to file a petition for a writ of certiorari in this case to and including December 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner, a member of the Georgia Bar, was twice found in contempt of the Pierce County Superior Court while he was representing an indigent, black client at a hearing to determine whether this client would be sentenced to life or death for murder.[1/] These two criminal contempts occurred on September 14, 1977 (nunc pro tunc judgment entered on September 20, 1977) and September 22, 1977 (nunc pro tunc judgment

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1/ Petitioner's client, George Street, had previously been convicted of armed robbery and murder and had received a death sentence for murder. Street v. State, 237 Ga. 307, 227 S.E.2d 750 (1976). This Court reversed Street's death sentence, Street v. Georgia, 429 U.S. 995 (1976), because of a jury selection procedure which was violative of the rule of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Georgia Supreme Court then remanded the case, Street v. State, 238 Ga. 376, 233 S.E.2d 344 (1977), for the resentencing hearing at which the two criminal contempts occurred. At the conclusion of this hearing, Street received a sentence of life imprisonment.

entered on October 20, 1977), and petitioner received consecutive sentences of one day and three days' imprisonment, respectively. Execution of these sentences was stayed pending petitioner's appeal to the Court of Appeals of the State of Georgia, which affirmed petitioner's convictions on May 4, 1978. Farmer v. Holton, 146 Ga. App. 101, 245 S.E.2d 457 (1978). After the Supreme Court of Georgia denied certiorari in an unreported order entered on September 14, 1978, this Court denied certiorari on March 19, 1979. Farmer v. Holton, 440 U.S. 958 (1979).

On March 28, 1979, petitioner filed a federal habeas corpus petition in the United States District Court for the Southern District of Georgia.[2/] His

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2/ Petitioner met the exhaustion-of-state-remedies requirement of 28 U.S.C. § 2254(b), since the constitutional issues raised on habeas were expressly decided adversely to his contentions by the Georgia Court of Appeals. Farmer v. Holton, 146 Ga. App. 101, 245 S.E.2d 457 (1978). Moreover, Ga. Code Ann. § 50-116 explicitly provides that a person

(Continued)

motion for a stay of the execution of his sentences was denied, and he served his sentence of imprisonment for these two contempts.[3/] The district court subsequently entered an order denying habeas relief and dismissing the petition. See A. 66a. Petitioner appealed from this August 18, 1979 order, and the United States Court of Appeals for the Fifth Circuit, Unit B, affirmed the judgment of the district court on August 3, 1981. See A. 56a.

B. Statement of Facts

The relevant facts were set forth in detail by the court below, A. 1a-31a, and there is no need to repeat that description here in its entirety. The first finding of criminal contempt

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imprisoned for contempt may not be discharged on habeas corpus by a state court if the sentencing court "has not exceeded its jurisdiction in the length of the imprisonment imposed."

3/ The court below correctly held, 652 F.2d at 429, A. 4a-5a, that, pursuant to this Court's holding in Carafas v. LaVallee, 391 U.S. 234 (1968), this fact did not moot the habeas case.

occurred as a result of petitioner's objections to the district attorney calling petitioner's client by his first name on cross-examination. Petitioner contended that this was racially condescending toward his client and was an expression of invidious discrimination forbidden by the Fourteenth Amendment, since all the other participants in the trial (who were white), including petitioner, were addressed by the prosecution and by the court as "mister."[4/]

4/ Petitioner stated at one point that "we will refer to our client George Street by his first name, because that's an affectionate way that we feel about him. And we've known him a period of time." This was a declaration of how petitioner addressed his client in private conversations, and not in open court, for petitioner never referred to his client as "George" during formal judicial proceedings. The court below nonetheless stated in its opinion, 652 F.2d at 429, A. 5a, that petitioner himself referred to his client as "George" on direct examination. Petitioner subsequently filed a motion to correct the court of appeals' opinion, averring that there was no factual basis in the record for this statement. The court (Continued)

In response to the trial judge's question, "Are you going to allow us to proceed with the cross examination of this witness?" petitioner replied, "Your honor, I feel like in representing my client . . .", whereupon the court summarily found him in criminal contempt and sentenced petitioner to one day's imprisonment.

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denied the motion, despite an affidavit from petitioner stating that he had never referred to his client by his first name in formal judicial proceedings. The court of appeals recognized that there was no transcript evidence of petitioner's use of his client's first name, but noted that: (1) at oral argument in the court of appeals, petitioner's counsel responded to the question, "[D]id Mr. Farmer refer to him [George Street] by his first name?" with, "Yes, he did, your Honor;" and (2) at his deposition in this case, Mr. Street responded to the question, "What did Mr. Farmer call you during the trial?" with, "He called me by my first name." Neither of these responses, however, referred to what petitioner called his client during formal court proceedings. There is nothing whatsoever in the record to indicate petitioner called his client by his first name in open court.

The second summary adjudication of contempt occurred thirteen days later, during jury selection. In the morning, petitioner argued that his client was being subjected to racial discrimination in the courtroom because a racially differential standard was applied when jurors were stricken for cause, with black veniremen being more quickly excused. The trial court refused to allow petitioner to present evidence concerning what petitioner alleged to be a racially discriminatory jury selection process. After lunch, the court did allow petitioner to call a black citizen who wished to attend the trial but who had been given a cryptic warning not to attend by her white employer. The court assured this woman of her right to attend the trial and asked her to report any threats or harassment to him. The court declined, however, to explore the issue further of whether blacks were being intimidated and prevented from attending the trial, whereupon petitioner made the comment which resulted in the second summary finding of contempt:

[Petitioner]: Your Honor, the reason that we wanted to deal with it at this time is to point out to the Court, is that here are things that we are being able to show you and show the Court that's happening. We are not able to find out about everything that happens. We are only able to, I'm sure, know a very, very small part of what is happening. And, the Court has got to take corrective action and the Court has got to deal with this in a way that we've previously suggested in order that it will not happen. And, the Court has got to allow us to inquire into what the Court before lunch previously wants to cover up. And, that is the racism that exists that's effecting [sic] these jurors and effecting [sic] Your Honor . . .

MR. HAYES [the district attorney]: Your Honor, the State

> objects to the improper malicious argument he's making on the Court.
>
> THE COURT: All right, Mr. Farmer, the statement that the Court wants to cover it up is direct contempt of this Court, knowingly made by you. I have repeatedly warned you about this. Again you have sought to make that statement. The Court finds you in contempt of Court, sir, again. The Court sentences you to 3 days in the [county jail].

The trial court's findings of contempt made no reference to the evidentiary standard by which petitioner had been found guilty.

On appeal, the Georgia Court of Appeals followed the settled law of that State that criminal contempt:

> "is not, strictly speaking, a criminal case, but is only quasi-criminal. It is tried under the rules of civil

> procedure, rather than under the rules of criminal procedure, and a preponderance of evidence is sufficient to convict the defendant, as against the requirement of removal of any reasonable doubt which prevails in criminal cases."

Farmer v. Holton, supra, 245 S.E.2d at 462. The court went on to hold that "the trial court's adjudication of contempt will not be interferred [sic] with unless there is a flagrant abuse of discretion," and that "[i]f there is any substantial evidence authorizing a finding that the party so charged was guilty of contempt, and that is the trial judge's conclusion, his judgment must be affirmed insofar as the sufficiency of the evidence is concerned." Ibid. While the court at one point in its opinion stated, "The cases here present criminal contempt clearly and beyond a reasonable doubt," ibid., the basis of its holding was clearly articulated in its ruling upon petitioner's motion for rehearing. That ruling stated, in its entirety, that:

> Attorney Farmer takes issue with our holding that the standard of proof to be applied in contempt actions such as this is the civil standard of a preponderance of the evidence, insisting for the first time that this standard is contrary to the due process requirements established in Craig v. Harney, 331 U.S. 367, 67 S.Ct. 1249, 91 L.2d 1546 (1947). That case is not controlling since it turns upon First Amendment rights and the freedom of the press to make public comment on the actions of a judge, requiring a showing that the utterances created a "clear and present danger" to the administration of justice to merit punishment for contempt. We adhere to the authorities cited in the opinion.

Ibid.

The court below found petitioner's argument that his guilt of criminal contempt should be established

beyond a reasonable doubt "somewhat appealing, [but] its appeal is only superficial." 652 F.2d at 434; A. 33a. Because the contempts had been committed in the presence of the court, "the several standards of proof have no practical relevance," ibid.:

> In Farmer's case, the facts of his courtroom conduct are undisputed. The judge personally witnessed all of the conduct which was punished as contumacious. When the contempt occurs totally in the presence of the judge, there is no necessity for the production of evidence. Indeed, there is no burden of persuading the trier of fact as there is no fact finding process to be conducted. Where the contumacious conduct is committed in the presence of the court in the immediate view of the judge, it is unnecessary for the court to apply any evidentiary standard of proof in order to summarily hold the contemnor in contempt

> of court. In such cases, it is a question of law for the court to decide whether the courtroom conduct which is factually undisputed amounts to criminal contempt of court.

Ibid.

REASONS WHY THE WRIT SHOULD BE GRANTED

This case is important and worthy of the Court's consideration because a plainly wrong and unconstitutional legal principle (that criminal guilt may be adjudicated on a preponderance of the evidence) has been relied upon to justify punishment of constitutionally protected conduct (objections by an attorney to racial discrimination in judicial proceedings). The court below confronted the issues presented on this record with candor and directness, but petitioner respectfully submits that it decided them incorrectly. What is at stake here is more than a single attorney's disciplinary record, for this case presents important general issues relating to the constitutional protections which must be accorded defense counsel

as such counsel strive to vindicate the rights of their clients to be free from invidious racial discrimination.

As an initial matter, there can be no doubt that Georgia's rule that criminal contempt may be adjudicated upon a preponderance of the evidence because such a charge is only "quasi-criminal" will not withstand scrutiny. It was no "quasi-criminal" jail in which petitioner served his sentence. Georgia's rule is completely aberrational[5/] and plainly unconstitutional.

5/ Appendix A of petitioner's brief in the court below, Farmer v. Strickland, No. 79-3908 (5th Cir.), sets forth the precedents in the federal courts and in the courts of thirty-four states and the District of Columbia requiring that criminal contempt be established beyond a reasonable doubt. In a few other states for which precedents are available, a "clear and convincing evidence" standard has been articulated, but the courts of these States emphasize that a preponderance of the evidence is insufficient. See, e.g., Stein v. Municipal Court of Sioux City, 46 N.W.2d 721, 724 (Iowa 1951): "[A] mere preponderance of the evidence

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"[C]riminal contempt is a crime in every fundamental respect," Bloon v. Illinois, 391 U.S. 194, 201 (1968), and therefore "use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." In re Winship, 397 U.S. 358, 363-64 (1970). See also In re Gault, 387 U.S. 1, 27 (1967). Georgia's unique rule differs significantly from that of all other American jurisdictions, and for that reason alone, review in this Court of a criminal contempt conviction based upon a preponderance of the evidence would be warranted.[6/]

The court below recognized the "appeal" of petitioner's argument, but

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in a contempt proceeding is not sufficient, as [the proof] must be of a clear, convincing and satisfactory nature." The Georgia rule is unique.

6/ The evidentiary standard used to determine criminal contempt is particularly important in a case where the adjudication is summary and by the same judge who is subjected to the contumacious conduct.

deemed this "appeal" to be only "superficial" since the contempt occurred in the presence of the court. For this reason, the court held, "there is no necessity for the production of evidence," 652 F.2d at 434, A. 34a, and the evidentiary standard of proof applied by the trial judge is therefore irrelevant. Petitioner respectfully submits that this analysis is thoroughly erroneous, for it confuses the permissible summariness of the adjudication with the evidentiary standard which must be applied. Even if Judge Holton could constitutionally pronounce petitioner's guilt in the twinkling of an eye, the Constitution requires that judgment to be grounded upon evidence that establishes guilt beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307 (1979), plainly so holds. This Court ruled there that In re Winship, supra, required "the fact-finder's application of the reasonable-doubt

standard," 443 U.S. at 316 (emphasis added), in a criminal case:[7] "a

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[7] In Jackson, the Court noted that, as in this case, "[t]he trier of fact . . . was a judge and not a jury. But this is of no constitutional significance," id. at 317 n.8. The Court held that when a federal habeas petitioner claimed he had been convicted in a state court upon insufficient evidence, the federal habeas court must consider not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt, as required by In re Winship.

> The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the fact-finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt', at a minimum, is one based upon 'reason.' Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury.

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defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence," id. at 320 n.14.[8/] There is on this record no doubt that Judge Holton

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Id. at 316-317 (footnotes omitted) (emphasis added).

8/ In a criminal case, if the fact-finder has applied an improper evidentiary standard, an appellate court may not simply re-examine the facts under the proper standard and affirm a judgment of conviction:

> [T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a [fact-finder] according to the procedure and standards appropriate for criminal trials . . . . [T]he belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, [may not be substituted for] the ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

Bollenbach v. United States, 326 U.S. 607, 614-15 (1946).

convicted petitioner Farmer upon a preponderance of the evidence, for such a standard was -- and is -- the plain law of the State of Georgia.[9/]

The fact that Judge Holton observed directly the events for which

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9/ The court below properly discounted the dictum of the Georgia Court of Appeals that the two incidents at issue in this case "present criminal contempt clearly and beyond a reasonable doubt." Farmer v. Holton, supra, 245 S.E.2d at 462. As the court below recognized, "under Georgia law a defendant who is tried for criminal contempt may be convicted on a preponderance of the evidence standard of proof." 652 F.2d at 434, A. 32a-33a. As set forth supra, petitioner had a constitutional right to have the trier of fact pronounce his guilt on evidence that established such guilt beyond a reasonable doubt. Moreover, the Georgia Court of Appeals' statement was merely a rhetorical afterthought, for it plainly stated in its opinion denying rehearing that "[w]e adhere to the authorities cited in the opinion" that "the standard of proof to be applied in contempt actions such as this is the civil standard of a preponderance of the evidence." Farmer v. Holton, supra, 245 S.E.2d at 462.

he found petitioner in contempt by a preponderance of the evidence by no means forecloses the possibility of petitioner's having a defense to the contempt charges if the contempt had to be established to Judge Holton's satisfaction beyond a reasonable doubt. Petitioner "might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or he might present matters in mitigation or otherwise attempt to make amends with the court." Taylor v. Hayes, 418 U.S. 488, 499 (1974). Judge Holton's reliance on the preponderance-of-the-evidence standard necessarily pretermitted significant factual issues pertaining to petitioner's guilt. To be guilty of contempt in Georgia, a defendant must commit some act which entails "interruption, disturbance, or hindrance to [the] proceedings" of a court, Crudup v. State, 218 Ga. 819, 130 S.E.2d 733 (1963), and this act must be accompanied by an intent which contains "an element of criminality, involving . . . the willful disobedience of orders or

decrees made in the administration of justice," Drakeford v. Adams, 98 Ga. 722, 25 S.E. 833 (1896). Georgia's peculiarly lax evidentiary standard for contempt allowed the imposition upon petitioner of criminal penalties when the requisite disruptive intent and "willfulness" were lacking.

This Court has squarely held that a black criminal defendant may not be held in contempt for refusing to answer a prosecutor or judge who addresses her by her first name. Hamilton v. Alabama, 376 U.S. 650 (1964), rev'g Ex parte Hamilton, 156 So. 2d 926 (Ala. 1963). See also Johnson v. Virginia, 373 U.S. 61 (1963). It is clear that if petitioner's client had refused to answer when addressed by the prosecutor as "George," a contempt conviction would not be sustained even if the beyond-a-reasonable-doubt standard had been applied by the trier of fact. Under the circumstances here, when petitioner's client's life was quite literally in the balance, it is hardly self-evident beyond a reasonable doubt that petitioner was engaging in "willful"

behavior when he attempted to assert vicariously his client's constitutional right to be free from being condescendingly addressed by his first name by an officer of the court during judicial proceedings.

Moreover, the preponderance-of-the-evidence standard applied by Judge Holton gave inadequate recognition to other federal constitutional protections which hedge the summary contempt power. This Court has held, Holt v. Virginia, 381 U.S. 131 (1965); In re McConnell, 370 U.S. 230 (1962), that a lawyer may not be cited for contempt simply for presenting legal arguments and contentions. The test for criminal contempt is not the "vehemence of the language," Craig v. Harney, 331 U.S. 367, 376 (1947), used by the lawyer but whether there is actual obstruction.

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the

> judge in the performance of his judicial duty.

In re McConnell, supra, 370 U.S. at 236. For mere language to be contumacious, it "'must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil.'" In re Little, 404 U.S. 553, 555 (1972).

It is not clear, under a proper evidentiary standard, that petitioner's conduct constituted actual obstruction. While such a hindrance of the court's functioning might occur through prolix and vociferous argument, see, e.g., In re Sacher, 343 U.S. 1 (1952), the good-faith albeit intemperate presentation of an objection to racial discrimination, well founded in the decisions of this Court and plainly relevant to issues at the trial, is, arguably, not actual obstruction of the proceedings. For here, while petitioner was vigorously argumentative and perhaps unduly strident in his attempts to assert and protect the rights of his indigent client, his conduct did not

significantly impede the progress of the hearings in which he was participating. The gist of the contumacious conduct here was not profanity, see Eaton v. City of Tulsa, 415 U.S. 697 (1974); In re Little, 404 U.S. 553 (1972); physical violence, see Illinois v. Allen, 397 U.S. 337 (1970); ad hominem abusive diatribes, see Mayberry v. Pennsylvania, 400 U.S. 455 (1971); or the assertion that petitioner had a "'"right to ask the questions, and [I] propose to do so unless some bailiff stops me,"'" In re McConnell, 370 U.S. 230, 235 (1962) (emphasis deleted). His conduct rather consisted of legal arguments and contentions on behalf of his client. While it is necessary for a judge to protect his courtroom from the obstruction of justice, "it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases." In re McConnell, supra, 370 U.S. at 236.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

Millard C. FARMER, Jr., Petitioner,

v.

Noah J. STRICKLAND, Sheriff of Pierce County, Respondent.

No. 79-3908

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 3, 1981.

David E. Kendall, Washington, D. C., John Charles Boger, New York City, John R. Myer, Atlanta, Ga., Randall M. Clark, Brunswick, Ga., for petitioner.

Dewey Hayes, Dist. Atty., Waycross Judicial Circuit, Douglas, Ga., Tony H. Hight, Pros. Atty. Council of Ga., Decatur, Ga., for respondent.

Appeal from the United States District Court for the Southern District of Georgia.

Before MORGAN, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The Superior Court of Pierce County, Georgia, twice summarily found attorney Millard C. Farmer, Jr., in

criminal contempt of court for contumacious conduct during his representation of a criminal defendant who was being resentenced by the court on a conviction for murder and armed robbery. Having unsuccessfully sought relief in the state courts of Georgia, petitioner Farmer filed his 28 U.S.C. § 2254 petition for writ of habeas corpus with the United States District Court for the Southern District of Georgia. As we have concluded that the district court was correct in denying the petitioner's habeas corpus petition, we affirm.

In September, 1977, Farmer was representing convicted murderer George Street, whose death sentence had been vacated by the United States Supreme Court, Street v. Georgia, 429 U.S. 995, 97 S.Ct. 520, 50 L.Ed.2d 606 (1976), and whose case had been remanded for resentencing to the Superior Court of Pierce County, Street v. State, 238 Ga. 376, 233 S.E.2d 344 (1977). The resentencing of Street included jury proceedings before the Honorable Elie L. Holton, Judge of the Pierce County Superior Court. Twice during the proceedings

Judge Holton found Farmer in criminal contempt of court and sentenced him to one and three days respectively in the county jail, the sentences to be served consecutively.

The two adjudications of contempt were affirmed by the Georgia Court of Appeals on May 4, 1978, Farmer v. Holton, 146 Ga. App. 102, 245 S.E.2d 457 (1978). The Supreme Court of Georgia denied certiorari on September 14, 1978. The United States Supreme Court denied Farmer's petition for writ of certiorari on March 19, 1979, Farmer v. Holton, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979). On March 28, 1979, the petitioner filed a petition for writ of habeas corpus, along with a motion for a stay of his four-day sentence pending appeal, with the district court. After a hearing on the motion for the stay on April 2, 1979, the district court denied the motion on April 5. Farmer was arrested by Pierce County authorities on April 7 and served his four-day sentence. On August 18, 1979, the district court denied Farmer's petition for writ of habeas corpus.

Although the petitioner had not yet begun to serve his four-day sentence at the time he filed his petition for writ of habeas corpus with the district court, clearly he was free on bond pending appeal which is to say he was sufficiently "in custody" for the purposes of 28 U.S.C. § 2254. Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, California, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973); Capler v. City of Greenville, Mississippi, 422 F.2d 299 (5th Cir. 1970); Marden v. Purdy, 490 F.2d 784 (5th Cir. 1969). The district court had jurisdiction to consider the petition. Accordingly, although the petitioner was no longer in custody pursuant to the Georgia state court judgment at the time of the district court's denial on the merits of the habeas corpus petition, this case is not moot under the holding of Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968). That case held that once federal jurisdiction over a § 2254 petition has attached in the district court, as it did here, the federal court's juris-

diction is not defeated by the petitioner's release prior to the completion of the federal habeas corpus proceedings. Thus, Farmer's claim is not moot, and we move on to a recitation of the facts and a consideration of the merits of his appeal.

At a motions hearing before Judge Holton on September 14, 1977, before a jury was selected, Farmer called his client, defendant Street, to the witness stand to testify in support of a defense motion to disqualify an assistant prosecutor from participation in the resentencing proceeding. After direct examination, during which Street was addressed as "George" by Farmer, Assistant District Attorney M. C. Pritchard began to cross-examine the defendant, also addressing him as "George." The following colloquy ensued:

> Q. When did this take place, George?
>
> MR. FARMER: Your Honor, may I object to -- I don't mean to harass Mr. Pritchard too awful much, but

we will refer to our client George Street by his first name, because that's an affectionate way that we feel about him. And, we've known him a period of time. But, we would insist that when he is referred to by the prosecutors that he be referred to as Mr.

MR. PRITCHARD: In other words, . . .

THE COURT: I will not direct you to do that.

Q. Do you have any objection to me calling you George?

MR. FARMER: Yes, sir, Your Honor, I object to -- his objection is from us. It is a demeaning thing for you to call black people by

the first name and to call white people Mr. We're not going to have a double standard. We're not going to be a part of it. And, we're not going to have it.

THE COURT: Objection overruled. You may ask the question.

MR. FARMER: Your Honor, it's a form of discrimination.

THE COURT: The objection is overruled. The objection is noted in the record.

Q. George, when did Mr. Strickland . . .

MR. FARMER: Your Honor, I object again to him calling my client George. We have stated repeatedly. [Sic.] He has used the term colored

folks and he referred to yesterday them. [Sic.] He said, "I'll call them whatever they want to be called." All of those things are racial slurs. This prosecutor is a racist. And, we've got to prevent it from coming through to the jury. We've got to prevent it from coming through to the Court at every stage. We resent the fact that he is referring to the client as Mr. We have been through this situation in this State in which a trial judge allowed and told prosecutors and District Attorneys not to call black people Mr. in his Court.

That's got to stop in this State if black people are to have equal justice. And, it can't stop if objection is not made to it at a proper time. If he is to address this individual he will address him as he addresses every other witness. He is not his friend. He is trying to have him electrocuted. And, he should address him as Mr. And, I, object most strenuously to him using this term and it's being used in a derogatory and a discriminatory way, just as he was using colored and them and they and those kind of terms. They're

all derogatory, racial slurs.

THE COURT: Objection overruled.

Q. George, when did . . .

MR. FARMER: Your Honor, I object to him referring to our client . . .

MR. PRITCHARD: . . .

MR. FARMER: . . . by any name . . .

THE COURT: Don't get up . . .

MR. FARMER: . . . at all.

THE COURT: Have a seat. Mr. Sheriff?

SHERIFF: Yes, sir.

THE COURT: Sit this gentlemen down by the name of Mr. Farmer. Don't make that objection again. I will let you have it as a continuing objection throughout the trial.

MR. FARMER: May we be heard?
THE COURT: No, sir.
MR. FARMER: May we put up evidence?
THE COURT: No, sir.
MR. FARMER: Your Honor, may we argue this motion?
THE COURT: No, sir. It's already been argued all the Court is going to hear it.
MR. FARMER: Your Honor, may I . . .
THE COURT: No, sir.
MR. FARMER: May I have time to prepare a motion?
THE COURT: No, sir.
MR FARMER: Your Honor, may I prepare a motion?
THE COURT: No, sir.

MR. FARMER: May I make an offer of proof?

THE COURT: No, sir.

MR. FARMER: May I confer with my client?

THE COURT: Not at this point, no, sir.

MR. FARMER: May I advise . . .

THE COURT: Your client is on the stand just like . . .

MR. FARMER: . . . my client regarding his rights?

THE COURT: . . . Don't interrupt the Court. Your client is on the stand. You put him on the stand just like any other witness. He will be treated just like any other witness.

MR. FARMER: Your, Honor, I . . .
THE COURT: No better or no worse.
MR. FARMER: I didn't put him on the stand to have him discriminated against.
THE COURT: Overruled. Now, don't make that objection again. You have a continuing objection. I mean about calling him by the name of George.
MR. FARMER: Your Honor, do you object to me calling you Elie?
THE COURT: Mr. Farmer, do not ask the Court any such question as that. That is a direct confront [sic] of the Court of it's [sic] authority. If you do

that again I will consider it as a contempt of this Court.

MR. FARMER: What, Your Honor, may I ask the Court. I want to inquire . . .

THE COURT: You are to be quiet at this point and we're going to proceed with the cross examination.

MR. FARMER: When may I make an objection?

THE COURT: Are you going to allow us to proceed with the cross examination of this witness?

MR. FARMER: Your Honor, I feel like in representing my client . . .

THE COURT: Mr. Farmer, this Court finds your continual

> interruption of the Court, your refusal to allow us to continue with examination of this witness to be in contempt of the Court. This Court so finds you in contempt of Court. It is the judgment of the Court that you are contempt [sic] of Court. It's the judgment of the Court that you be sentenced to the common jail of this county for a period of 24 hours. Mr. Sheriff?

The court recessed during which time Farmer was led away to be admitted to bond pending appeal. He returned to the courtroom and resumed his representation of Street. Judge Holton entered a written order of contempt dated September 14 which was signed nunc pro tunc on September 20, 1977.

The second summary adjudication of contempt occurred in open court on September 22, 1977, just prior to a sequestered individual voir dire examination of prospective jurors. In his representation of Street during those proceedings, Farmer had argued that his client was being subjected to racial discrimination through the jury selection process. Although the superior court trial judge cited 23 pages of transcript in his order adjudging Farmer in contempt, we will reproduce here only those portions of the transcript which seem to be the most relevant exchanges between the court and petitioner Farmer.

> THE COURT: Mr. Farmer, we're not going into that in this line of argument. If you want to state your point state it and I'll rule on it. But, I'm not going into any long drawn out argument.

MR. FARMER: All right, sir, the point I want to make is, Your Honor, that I feel that you are discriminating against my client because he's black.

THE COURT: Mr. Farmer, the argument is closed. You have used up your argument. You're overruled. The witness is not struck. Have a seat, sir.

MR. FARMER: Your Honor, may I be heard on another issue?

THE COURT: No, sir. We're going to proceed with the voir dire.

MR. FARMER: Your Honor, may we have an opportunity to deal with at some point if the court will tell

us when we can deal with the racial prejudice that is existing in this courtroom and make a record of . . .

THE COURT: You're not going to deal with it at any point.

MR. FARMER: May we make a record on it and show what's happening, Your Honor, that . . .

THE COURT: There's a complete record being made of everything going on in this courtroom.

MR. FARMER: Your Honor, the Court has ruled that we can't make a showing on that and the Court has ruled that -- I understand the Court's ruling on

that matter. I want the Court to understand that our motion is to the Court, that there is is a pattern of discrimination that is existing and that this pattern has developed itself as we told the Court in the pre-trial motions that it would develop [sic] itself.

THE COURT: I don't want to hear any more of that.

MR. FARMER: And, I . . .

THE COURT: And, I'm not going to hear it. You're just making an argument and that's all.

MR. FARMER: May we ask the court . . .

THE COURT: No, sir.

> MR. FARMER: . . . reporter to reflect in the record the race of the jurors as they come . . .
> THE COURT: Certainly you may.
> MR. FARMER: All right, sir. Will that be done?
> THE COURT: It will be done henceforth from the time you've requested it.

The court continued its examination of prospective jurors.

> MR. HAYES [Pierce County District Attorney]: Your Honor, the State at this time would challenge the juror for cause?
> THE COURT: All right. Any argument on that?
> MR. FARMER: Yes, Your Honor, I think it's complete [sic]

obvious that the juror has said without question that the jurors should not, that she could be fair and she could listen to the evidence in here and she could decide the evidence based on what would be presented in this courtroom. Now, I said to the Court previously and I want to reiterate that Mr. Hayes is asking questions that are confusing to the jurors. He is intimidating to the jurors and particularly to . . .

MR. HAYES: Your Honor, the State objects to him arguing that I intimidated a juror, because it's absolutely

false. It's been in the presence of the Court. He's just making a statement wanting to falsely accuse me and I object to it.

THE COURT: Go ahead.

MR. FARMER: Yes, sir. Your Honor, that he does ask -- he does have a manner that does intimidate black jurors by the way that he proceeds and . . .

MR. HAYES: Your Honor, once again I object to him making a flat, false statement. It's malicious, it's false . . .

THE COURT: Now, you understand, Mr. Hayes, this is an argument and that is

the conclusions [sic] that he said he draws from the questions you ask. That doesn't mean that it is true or not true.

MR. HAYES: I object to it further as not being a conclusion, being a personal remark and insulting to me and I object to it.

THE COURT: All right, I don't think it's -- well, I'm not -- it may not be insulting, but I'm going to let him go ahead with that.

MR. FARMER: And, Your Honor, I think it's completely obvious that these questions are asked in a way that are [sic] confusing to persons who have not

served on the jury before and who have not been allowed entry into our systems purely because of the fact of the color of their skin. They have been

. . .

MR. HAYES: Your Honor, the State objects to him going into a racial matter. The Court has already instructed him not to do that and he's right back in on it again.

THE COURT: He can leave race out -- now, if you go -- ahead with the argument. Go ahead.

MR. FARMER: Just as these questions were used in the voter registration days to keep people from

being able to register to vote. It can't be used in the same way to keep people from serving on the jury. The juror answered as fairly, as quickly and promptly as anybody could answer on all the relevant question [sic] when they were asked by the Court and when they were asked by me and they weren't asked in the intimidating way. The question were not understandable [sic] in the way that Mr. Hayes was leading and asking them in a leading way purely for the disqualification because of race.
THE COURT: All right. Strike the

> juror for cause.
>
> MR. FARMER: Your Honor, may we heard [sic] on the continual discrimination on the part of this Court in the way you're striking these jurors?
>
> THE COURT: No, sir, you may have a seat. And you will not make any further remarks like that.

After the proceedings recessed for lunch the court permitted Farmer, on behalf of his client, to present testimony concerning alleged intimidation of people who were attending the court sessions. Following testimony given on that subject, the colloquy between the petitioner and the court continued as follows:

> MR. FARMER: Your Honor, the reason that we wanted to deal with it at this time is to point out

to the Court, is that here are things that we are being able to show you and show the Court that's happening. We are not able to find out about everything that happens. We are only able to, I'm sure, to know a very, very small part of what is happening. And, the Court has got to take corrective action and the Court has got to deal with this in a way that we've previously suggested in order that it will not happen. And, the Court has got to allow us to inquire into what the Court before lunch and previously wants to cover up. And, that is the racism that

exists that's effecting [sic] these jurors and effecting [sic] Your Honor . . .

MR. HAYES: Your Honor, the State objects to the improper malicious argument he's making on the Court.

THE COURT: All right, Mr. Farner, the statement that the Court wants to cover it up is a direct contempt of the Court, knowingly made by you. I have repeatedly warned you about this. Again you have sought to make that statement. The Court finds you in contempt of Court, sir, again. The Court sentences you to 3

days in the county jail, ser . . .
MR. FARMER: Your Honor, may I be . . .
THE COURT: . . . service to begin at the termination of this case. That's all.
MR. FARMER: Your Honor, may I be heard on this?
THE COURT: No, sir.
MR. FARMER: Your Honor, may I have counsel to represent me and present evidence on this issue?
THE COURT: No, sir.
MR. FARMER: Your Honor, may I for the purpose of here forward understand what can be my role in representing Mr. Street as far as bringing out the reason that I feel

> that he is being denyed a fair trial. I don't understand, Your Honor?
>
> THE COURT: You'll have to exercise your discretion and your knowledge as an attorney.
>
> MR. FARMER: Your Honor, . . .
>
> THE COURT: That's all.
>
> MR. FARMER: Your Honor, may I . . .
>
> THE COURT: No, sir, we're through with that discussion. All right, call the next juror, Mr. Clerk.

Farmer was admitted to bond pending the appeal of his second contempt conviction. Street's resentencing trial proceeded, with Farmer serving as Street's attorney. Street ultimately

received a sentence of life imprisonment.[1/]

Farmer raises four issues on appeal. First, he contends that the two contempt convictions violated his fourteenth amendment due process rights because the Georgia state trial court allegedly applied a preponderance of the evidence standard, rather than the higher evidentiary standard of guilt beyond a reasonable doubt. Second, the petitioner argues that his contumacious conduct was protected by the sixth and fourteenth amendments since he was "vicariously asserting" the constitutional right of his client to be free from racial discrimination in judicial proceedings. Third, Farmer contends that under the decision in Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), he was entitled to a hearing on the contempt charges before he was sentenced. Fourth, Farmer argues that

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1/ Since Street received the most favorable sentence possible under the circumstances, he did not prosecute an appeal.

he was denied his due process rights because the state trial judge who sentenced him was the "target" of the allegedly contumacious conduct and another judge who was not "personally embroiled" with Farmer should have been appointed to pronounce sentence.

I.

Farmer argues first that he was deprived of his fourteenth amendment due process rights because he was adjudicated in criminal contempt of court and sentenced to jail on a preponderance of the evidence standard of proof rather than on the basis of evidence which established his guilt beyond a reasonable doubt. In his formal orders citing Farmer for criminal contempt, Judge Holton made no reference to any evidentiary standard. On appeal to the Court of Appeals of Georgia, that court held that Farmer's two cases "present criminal contempt clearly and beyond a reasonable doubt." Farmer v. Holton, 146 Ga. App. 102, 109, 245 S.E. 2d 457, 462 (078). As the Court of Appeals of Georgia acknowledged in Farmer v. Holton, under Georgia law a defendant

who is tried for criminal contempt may be convicted on a preponderance of the evidence standard of proof. See Pedigo v. Celanese Corp. of America, 205 Ga. 392, 54 S.E.2d 252 (1949), cert. denied, 338 U.S. 937, 70 S.Ct. 345, 94 L.Ed. 578 (1950); Hill v. Bartlett, 124 Ga.App. 56, 183 S.E.2d 80 (1971). Farmer contends that a party may not be summarily held in criminal contempt for conduct committed in the presence of the court unless the court as trier of fact establishes the contemnor's guilt "beyond a reasonable doubt." Farmer bases his argument that his guilt on summary criminal contempt should be proved beyond a reasonable doubt on two Supreme Court cases, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). While this argument is somewhat appealing, its appeal is only superficial. In our view, the concern over the constitutionally acceptable evidentiary standard to be applied to cases such as this is unfounded. Where the criminal contempt is committed totally in the presence of

the judge, the several standards of proof have no practical relevance.

In Farmer's case, the facts of his courtroom conduct are undisputed. The judge personally witnessed all of the conduct which was punished as contumacious. When the contempt occurs totally in the presence of the judge, there is no necessity for the production of evidence. Indeed, there is no burden of persuading the trier of fact as there is no fact finding process to be conducted. Where the contumacious conduct is committed in the presence of the court in the immediate view of the judge, it is unnecessary for the court to apply any evidentiary standard of proof in order to summarily hold the contemnor in contempt of court. In such cases, it is a question of law for the court to decide whether the courtroom conduct which is factually undisputed amounts to criminal contempt of court. Therefore, Farmer's first argument is without merit.

II.

Next, relying primarily on Hamilton v. Alabama, 376 U.S. 650, 84 S.Ct. 982, 11 L.Ed.2d 979 (1964), rev'g, ex parte Hamilton, 275 Ala. 574, 156 So.2d 926 (1963), and Johnson v. Virginia, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (1963), Farmer contends that at least his first contempt conviction was unconstitutional because his argument to the judge was protected since he was vicariously asserting the right of George Street not to be addressed as "George" by the prosecutor. Although Judge Holton ruled that Street was entitled to a "continuing objection," Farmer argues that his refusal to cease his argument once the trial judge had ruled should not be penalized as contempt since it was "[t]he only way to vindicate effectively and fairly Street's right to be free of racial discrimination in the court room [sic]." Appellant's brief at 35. This contention is vacuous.

The decisions in both Hamilton and Johnson reversed contempt convic-

tions which had been imposed because the contemnors had refused to comply with radically discriminatory orders given to them in open court by state court trial judges. In Johnson, the Supreme Court reversed the contempt conviction of a black man who had refused to obey a Virginia state court trial judge's order to move to the "colored" section of the courtroom. The Court held that "[s]uch a conviction cannot stand, for it is no longer open to question that a State may not constitutionally require segregation of public facilities." 373 U.S. at 62, 83 S.Ct. at 1054. In Hamilton, a witness in an Alabama court proceeding refused to answer questions propounded to her by an attorney who addressed the witness by her first name only. She was found in contempt of court upon her refusal to answer the questions until she was addressed correctly. The Supreme Court reversed her conviction based on Johnson. The Georgia trial judge's ruling that Farmer's client could be addressed by his first name, even though clearly racially discriminatory to the client under the holding in

Johnson, certainly cannot be said to have infringed on any rights of Farmer to be free from racial animus. In both Hamilton and Johnson the accused contemnors had been the victims or targets of racially discriminatory orders issued from the bench. Those circumstances simply are not present in this case. Once an objection has been made by an attorney and the court has made its considered ruling, subsequent contumacious conduct will not be excused merely for the fact that it was committed by an officer of the court during court proceedings in an attempt to protect the rights of the attorney's client.

While we certainly appreciate a lawyer's professional duty to safeguard the constitutional rights of his client, we think that Farmer exceeded the bounds of "fearless, vigorous and effective" advocacy here in persisting in his objections and argument once the trial judge had ruled on the matter and had instructed Farmer not to "make that objection again." The following statement from the Supreme Court's opinion in Sacher v. United States, 343 U.S. 1, 72

S.Ct. 451, 96 L.Ed. 717 (1952), is particularly appropriate:

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge -- his right is only respectfully to preserve his point for appeal. During a trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the bar of them were it not for the misconceptions manifest in this case.

Id. at 9, 72 S.Ct. at 455.

Here, Farmer, in both instances, did more than simply vicariously assert his client's right to be tried in an atmosphere free from perceived racial discrimination. The appellant, a practicing attorney with significant courtroom experience, intentionally ignored the trial judge's instruction to desist from pursuing his argument further and also disregarded the judge's warning that continued argument on the matter would risk a contempt citation. Furthermore, Farmer's retort to the judge that, "do you object to me calling you Elie?' is the type of disrespectful, insulting behavior on the part of officers of the court that will not be countenanced in a court of law. We do not "equate contempt with courage or insults with independence." Sacher v. United States, 343 U.S. at 14, 72 S.Ct. at 457.[2/]

[2/] See also In re McLarty, 150 Ga.App. 395, 258 S.E.2d 10 (1979).

III.

Farmer next challenges his contempt convictions on the ground that he was not afforded a hearing at which he could have presented evidence in mitigation and argue that his conduct was not contemptuous. In arguing that the decision in Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974), is controlling, Farmer contends that under the circumstances of this case the trial judge should not have summarily convicted him for contempt without conducting a hearing on the matter. Although Taylor did significantly limit a trial judge's authority to punish contemptuous conduct summarily when the final adjudication of contempt and sentencing are postponed until after trial, it is clear that the use of summary contempt procedures is appropriate in certain circumstances. United States v. Wilson, 421 U.S. 309, 95 S. Ct. 1802, 44 L.Ed.2d 186 (1975).[3/] We conclude

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3/ See generally, Kuhns, The Summary Contempt Power: A Critique and a

(Continued)

that the state trial court's use of summary contempt proceedings here was not only appropriate but was necessary to maintain the orderly administration of judicial proceedings.

The general powers of Georgia state courts are set forth in Ga.Code Ann. § 24-104.[4] Ga.Code Ann.§ 24-105[5]

New Perspective, 88 Yale L.J. 39 (1978).

[4] Ga.Code Ann. § 24-104 provides in pertinent part: Every court has power

> (1) To preserve and enforce order in its immediate presence, and as near thereto as is necessary to prevent interruption, disturbance, or hindrance to its proceedings.
>
> * * * * *

[5] Ga.Code Ann. § 24-105 provides in pertinent part: The powers of the several courts to issue attachments and inflict summary punishment for contempt of court shall extend only to cases of misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the dis-

(Continued)

specifically authorizes state courts to "inflict summary contempt of court" only when the contumacious conduct serves to "obstruct the administration of justice." Rule 23 of the Georgia Superior Courts states: "No attorney shall ever attempt to argue or explain a case, after having been fully heard, and the opinion of the court has been pronounced, on pain of being considered in contempt." Ga.Code Ann. § 24-3323.

In Taylor v. Hayes an attorney who had been found in contempt of court nine times during a controversial turbulent trial appealed his convictions contending, inter alia, that he was entitled to notice and a hearing before the court finally convicted him and pronounced sentence. After each contemptuous episode during the trial of his client, the attorney had been informed by the trial judge that he "con-

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obedience or resistance by any officer of said court, party, juror, witness, or other person or persons to any lawful writ, process, order, rule, decree, or command of the said courts:

. . . . .

sidered" the attorney to be in contempt. However, the judge did not pronounce any of the sentences until after the client's trial had finished, and apparently the attorney was not finally adjudicated in contempt until the conclusion of the trial.

Taylor v. Hayes is particularly helpful in delineating when a hearing is necessary in summary contempt proceedings. The Court noted that it was not concerned "with the trial judge's power, for the purpose of maintaining order in the courtroom, to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him." 418 U.S. at 497, 94 S.Ct. at 2702-03. However, the Court added that "[t]he usual justification of necessity . . . is not nearly so cogent when final adjudication and sentence are postponed until after trial." Id., 94 S.Ct. at 2703 (citation and footnote omitted). Therefore, relying on Groppi v. Leslie, 404 U.S. 496, 92 S.Ct. 582, 30 L.Ed.2d 632 (1972), the Court held that:

> [B]efore an attorney is finally adjudicated in contempt and sentenced after trial for conduct during trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. This is not to say, however, that a full-scale trial is appropriate. Usually, the events have occurred before the judge's own eyes, and a reporter's transcript is available. But the contemnor might at least urge, for example, that the behavior at issue was not contempt but the acceptable conduct of an attorney representing his client; or, he might present matters in mitigation or otherwise attempt to make amends with the court.

Taylor v. Hayes, 418 U.S. at 498-99, 94 S.Ct. at 2703 (emphasis supplied).

Unlike Taylor, however, here Farmer was "finally adjudicated in contempt and sentenced" during trial for conduct which certainly threatened the

orderly administration of judicial proceedings. The petitioner acknowledges the significant distinction between Taylor and the facts presented here but contends that the distinction is not fatal to his argument that a hearing was required because the State of Georgia had no compelling state interest in denying the contemnor an opportunity to be heard on the matter. Specifically, Farmer submits that Judge Holton had not finally adjudicated him in contempt during the trial since the court's formal written contempt orders were entered nunc pro tunc approximately one week after each episode occurred. We are not persuaded.

While we recognize that "[s]ummary punishment always, and rightly, is regarded with disfavor," Sacher v. United States, 343 U.S. at 8, 72 S.Ct. at 454, there is no doubt that the summary contempt power is still available to courts, under the appropriate circumstances, to control judicial proceedings. United States v. Wilson, supra. As the Supreme Court noted in reviewing a case of contempt committed in a state

court proceeding, "[i]nstant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court." Johnson v. Mississippi, 403 U.S. 212, 214, 91 S.Ct. 1778, 1779, 29 L.Ed.2d 423 (1971).

Furthermore, in a federal court case involving a lawyer's contempt citation for arguing his client's case, the Supreme Court wrote: "[t]he arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty." In re McConnell, 370 U.S. 230, 236, 82 S.Ct. 1288, 1292, 8 L.Ed.2d 434 (1962). As the Court of Appeals for the Seventh Circuit explained in the well known contempt case of United States v. Seale, 461 F.2d 345 (7th Cir. 1972):

> The unmistakable implication of In re McConnell, . . ., is that defiance of the court's order

> to cease questioning would have actually obstructed the proceedings. As governor of the trial, the trial judge must have the authority necessary to ensure the orderly and expeditious progress of the proceedings. His directives in exercise of this authority must be obeyed; otherwise the clear result would be courtroom chaos. Wholly arbitrary limits on argument will, if prejudicial, merit reversal of the substantive case, but that hardly can excuse open defiance of the court's commands.
>
> . . . . .
>
> A certain amount of leeway must be allowed. But where the directive is clear, the judge's insistence on obedience is not undercut by his further rejoinder, and the party directed understands what is being asked of him, he must obey.

Id. at 371 (citations and footnote omitted). We emphasize that "[i]t is essen-

tial to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country." Illinois v. Allen, 397 U.S. 337, 343, 90 S.Ct. 1057, 1061, 25 L.Ed.2d 353 (1970).

IV.

Farmer's final argument is that he was denied due process of law because the judge who summarily held the appellant in criminal contempt of court also pronounced sentence. The petitioner contends that he and the Georgia state trial judge were "personally embroiled" in the sense that the judge was the "target" of the contumacious conduct. Therefore, relying on the Supreme Court's decision in Mayberry v. Pennsylvania, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971), Farmer submits that he "was entitled to be sentenced by a neutral and detached jurist."

In Mayberry v. Pennsylvania a state court defendant, representing himself at trial, engaged in conduct at trial that Justice Douglas described as

"a shock to those raised in the Western tradition that considers a courtroom a hallowed place of quiet dignity as far removed as possible from the emotions of the street." 400 U.S. at 456, 91 S.Ct. at 500. Throughout the trial in Mayberry, the defendant had verbally attacked the trial judge, accusing him of running a Spanish Inquisition and routinely denouncing the judge in vulgar language. Concluding that throughout the state court trial the trial judge had been the "target" of the contemnor's contemptuous conduct, the Supreme Court recognized that such "a judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy." 400 U.S. at 465, 91 S.Ct. at 505. As a result, "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." Id.

In holding that a defendant in a criminal contempt proceeding is entitled to a trial before a judge other than the one who was the target of the allegedly slanderous personal attacks,

the Court provided the following general guidelines:

> Generalizations are difficult. Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved. Moreover, we do not say that the more vicious the attack on the judge the less qualified he is to act. A judge cannot be driven out of a case. Where, however, he does not act the instant contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place.
>
> . . . . .
>
> Whether the trial be federal or state, the concern of due process is with the fair administration of justice. At times a judge has not been the

> image of "the impersonal authority of law" (Offutt v. United States, 348 U.S. 11, 17, 75 S.Ct. 11, 15, 99 L.Ed. 11) but has become so "personally embroiled" with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge.

Mayberry v. Pennsylvania, 400 U.S. at 463-65, 91 S.Ct. at 504-05 (emphasis supplied). It should be emphasized at this point that since Farmer's two summary contempt citations were for conduct that took place in open court before the jury had been empaneled, we do not think that the use of the summary contempt power here in any way prejudiced the rights of Farmer's client, George Street.

Furthermore, the Supreme Court also noted in Mayberry that,

> It is, of course, not every attack on a judge that disqualifies him from sitting. In Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921, we ruled that a

> lawyer's challenge, though "disruptive, recalcitrant and disagreeable commentary," was still not "an insulting attack upon the integrity of the judge carrying such potential for bias as to require disqualification." Id., at 584, 84 S.Ct. at 847.

Mayberry v. Pennsylvania, 400 U.S. at 465-66, 91 S.Ct. at 505.

That part of the state trial court record which is before us on appeal does not support the petitioner's claim that the Georgia trial judge became "personally embroiled" with the contemnor so that the judge should have requested that another judge sit in judgment on the contempt charges. In our view, the judge did not demonstrate any bias toward the petitioner's conduct. In fact, the judge exhibited remarkable patience and restraint considering the defiant, disruptive course of conduct followed by the attorney in this case. In both the contempt episodes, the judge repeatedly warned the petitioner that if he persisted in his

argument that he would risk being held in contempt of court. Yet the petitioner knowingly persisted and engaged in sarcastic, disrespectful challenges to the court's rulings and authority. Clearly, the state trial judge "used the summary contempt power only as a last resort." Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, 552 F.2d 498, 514 (3d Cir. 1977). The trial judge in this case was subjected to disrespectful and sarcastic comments made by the attorney. Notably, Farmer's gibe, "do you object to me calling you Elie?", and his argument that the court was attempting to "cover up" alleged racism in the selection of jurors undoubtedly related to Judge Holton's rulings on the attorney's objections. However, as we have already indicated that the use of the summary contempt power was necessary to maintain the orderly administration of the court proceedings, we do not agree that the petitioner's contumacious conduct rose to the level of personal vilification and scurrilous attacks on the judge so as to disqualify him from pro-

nouncing sentence on the contemnor. Under the circumstances of this case the petitioner's fourteenth amendment due process rights were not violated by the Georgia trial judge's immediate sentencing of the petitioner for the contempt violations.

The order of the district court denying the petition for writ of habeas corpus is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-3908

D. C. DOCKET NO. CV-579-19

MILLARD C. FARMER, JR.,

Petitioner-Appellant,

versus

NOAH J. STRICKLAND, SHERIFF OF PIERCE COUNTY,

Respondent-Appellee.

Appeal from the United States
District Court for the
Northern District of Georgia

Before MORGAN, ANDERSON and
THOMAS A. CLARK, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from in this cause be and the same is hereby affirmed.

August 3, 1981

ISSUED AS MANDATE: September 24, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
WAYCROSS DIVISION

MILLARD C. FARMER, JR.	*	
Petitioner	*	
Vs.	*	CIVIL ACTION
	*	NO. CV 579-19
NOAH J. STRICKLAND,	*	
Sheriff of	*	
Pierce County, Georgia,	*	
Respondent	*	

ORDER ON PETITION FOR
WRIT OF HABEAS CORPUS

Millard C. Farmer, Jr., an attorney, has filed this petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, seeking to void two state sentences, totalling four days in jail, for alleged willful contempts occurring in the presence of the sentencing state judge. It appears that the challenged adjudications were made, and the sentences were imposed, immediately after commission of the alleged contumacious conduct by the attorney.

The adjudications of contempt were affirmed by the Court of Appeals of Georgia, Farmer v. Holton, 146 Ga. App. 102, 245 S.E. 2d 45 (1978). Farmer's petition for certiorari to the Court of Appeals of Georgia was denied initially and on motion for reconsideration by the Supreme Court of Georgia on October 3, 1978.

On December 15, 1978, Farmer's petition for a writ of certiorari to the Court of Appeals of Georgia was filed in the Supreme Court of the United States and, on March 19, 1979, was denied by the Supreme Court.

Petitioner's motion for stay of execution of the state sentences was denied by this Court by Order of April 5, 1979, after a hearing on April 2, 1979 at which the parties were given a full opportunity to present evidence and arguments. Farmer's petition and supplemental memorandum set forth four grounds which, he contends, entitle him to the relief he seeks. First, petitioner claims that he was deprived of due process of law because he was adjudicated in criminal contempt and sen-

tenced to jail on a preponderance of the evidence rather than on evidence which established his guilt beyond a reasonable doubt. The Court of Appeals of Georgia, however, after reviewing the record on appeal, decided that:

> "The cases here present criminal contempt clearly and beyond a reasonable doubt. Counsel's continuous disregard of the court's instructions, his question to the Court, 'do you object to me calling you Elie?,' his verbal assault on the Court charging it with malicious and arbitrary reasoning on rulings made during voir dire, and his assertion that the Court would not allow him to inquire into 'what the Court . . . wants to cover up. And, that is the racism that exists that's affecting these jurors and affecting Your Honor . . .' were insulting, contemptuous, and contumacious. As shown by the record, and by virtue of the rules of law stated and particularly Code Ann. § 24-3323, we are unable to say that the trial judge's adjudications of contempt were gross, erroneous or flagrant abuses of discretion." (Emphasis added)

Farmer v. Holton, 146 Ga. App. 102, 109 (1978). Since the Court of Appeals of Georgia concluded from its review of the

record that the conduct of the petitioner justified an adjudication of contempt clearly and beyond a reasonable doubt, the question whether petitioner was deprived of due process of law by application of preponderance of the evidence standard does not arise on the facts of this case. Moreover, the state appellate court's characterization of the weight of the evidence is substantially supported by the record and brooks no "second-guessing" or redetermination by this Court. See 28 U.S.C. § 2254 (d).

Petitioner asserts, however, that the application by the Court of Appeals of Georgia of the beyond-a-reasonable doubt standard when it reviewed petitioner's conviction violated the rule set forth in Cole v. Arkansas, 333 U.S. 196 (1940) and Presnell v. Georgia, ___ U.S. ___, 58 L.Ed.2d 207, 99 S.Ct. __, (1978). Those cases, however, deal with deprivations of due process occurring either because the state appellate court affirmed a conviction on a provision of the substantive criminal law other than the one under which de-

fendant was convicted, or because the state appellate court affirmed a conviction for murder on the basis of certain aggravating circumstances not found by the jury. Cole v. Arkansas, supra, and Presnell v. Georgia, supra, do not preclude the affirmance of a criminal contempt conviction on the basis of an appellate review of the evidence under a higher evidentiary standard than that applied by the convicting Court, even if such occurred, here. The record does not, however, disclose that the trial judge found Farmer guilty merely from a preponderance of the evidence.

Next, Farmer asserts that the Sixth and Fourteenth Amendments to the Constitution of the United States prohibit his being adjudged in contempt in this case because he was asserting the rights of his client. This Court recognizes the importance of protecting the right of the attorney to assert vigorously the rights of his client. However,

> "[a] balance must be maintained . . . between the necessity for judicial power to curb

> obstruction of justice in the courtroom and the need for lawyers to present their clients' case fairly, fearlessly, and strenuously. In preserving the balance, a court must not exercise its summary power of contempt to stifle courageous and zealous advocacy, and thereby impair the independence of the bar. On the other hand, the dignity, the independence, and the control of the court must not be degraded by lawyers who 'equate contempt with courage . . . . [T]he processes of orderly trial, which [are] the supreme object of the lawyer's calling,' must be protected. Sacher v. United States, 343 U.S. 1, 14, 72, S.Ct. 451, 457, 96 L.Ed. 717 (1952)."

Commonwealth of Pennsylvania v. Local Union 542, Appeal of Freedman, 552 F.2d 498, 503 (3rd Cir. 1977). Here, the convicting state court afforded petitioner the opportunity fully to assert the interests of his client by granting a continuing objection to the conduct of the prosecutor which was the subject of petitioner's contemptuous words and conduct. Petitioner's continued objections and interruptions of the Court, and his direct affronts to the dignity and integrity of the Court, clearly could not

be justified under petitioner's duty to his client.

Petitioner also contends that his summary conviction for contempt violated his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States. Under Georgia law, every Court has the power "to preserve and enforce order in its immediate presence . . . to prevent interruption, disturbance, or hindrance to its proceedings." Ga. Code Ann. § 24-104(1). Further, under Georgia law, Courts are empowered to inflict summary punishment for contempt in cases where contemptuous conduct occurs in the presence of the Court and obstructs the administration of justice as well as in cases where an officer of the Court disobeys or resists any lawful order, decree, or command of the Court Ga. Code Ann. § 24-105. In addition, attorneys are prohibited by Georgia law from "ever attempt[ing] to argue or explain a case, after having been fully heard, and the opinion of the Court has been pronounced, on pain of being considered in contempt." Ga. Code Ann. § 24-3323.

The facts of this case, as they appear in the record, amply demonstrate that petitioner's conduct in the presence of the convicting state court warranted the imposition of summary conviction and punishment as authorized by Georgia law. Compare United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977). See Fed. R. Crim. P. Rule 42.

State and federal statutes, recognizing the inherent power of a Court to punish summarily contemptuous acts committed in its presence, have been upheld as not violative of Federal Constitutional safeguards. In re Oliver, 333 U.S. 257 (1948); Ex parte Terry, 128 U.S. 289 (1888). See United States v. Abascal, 509 F.2d 752 (9th Cir. 1975); Moody v. State of Georgia, 131 Ga. App. 355 (1974); White v. George, 195 Ga. 465 (1943); Garland v. State of Georgia, 99 Ga. App. 826 (1959).

A fair appraisal of the record supports the conclusion that summary adjudication was the only way the trial judge could secure an orderly, seemly, decorous trial.

Petitioner contends, finally, that he was denied due process of law in violation of the Fourteenth Amendment to the Constitution of the United States when the judge, who was the target of the alleged contumacious conduct, summarily determined petitioner to be in contempt and pronounced sentence upon him. Petitioner relies on cases which hold that when a judge has become "personally embroiled" with the defendant such that it is impossible for the judge to maintain the calm detachment necessary for fair adjudication, non-summary disposition is required. See Offutt v. United States, 348 U.S. 11 (1954); Mayberry v. Pennsylvania, 400 U.S. 455 (1971). The record in the present case, however, does not support the contention that the convicting state court became personally embroiled with petitioner and that the court was, therefore, unable to sit objectively and impartially on the contempt charges. "The trial judge exhibited patience and restraint, and did his utmost to preserve order and decorum; he did not engage in wrangling or bickering, and used the summary contempt

power only as a last resort." Commonwealth of Pennsylvania v. Local Union 542, Appeal of Freedman, supra, at 514. See In re William, 500 F.2d 403, 405 (2d Cir. 1974), cert. denied, 419 U.S. 1107 (1975); United States v. Schiffer, 351 F.2d 91, 95 (6th Cir 1965), cert. denied, 384 U.S. 1003 (1966). This Court concludes that summary disposition was proper.

Petitioner's grounds for issuance of the writ of habeas corpus considered, it is the opinion of this Court that the petition for writ of habeas corpus should be, and it is hereby DENIED.

The Clerk is directed to enter a judgment dismissing the petition.

So Ordered, this 18th day of August, 1979.

s/_____
CHIEF JUDGE, UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA

Opposition

No. 81-1122

Office - Supreme Court, U.S.
FILED
JAN 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MILLARD C. FARMER, JR.,
Petitioner,

v.

NOAH J. STRICKLAND, Sheriff of
Pierce County, Georgia,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, UNIT B

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED FOR REVIEW

I. PETITIONER'S QUESTION PRESENTED FOR REVIEW, AS STATED, IS UNACCEPTABLE BY RESPONDENT.

Counsel for Respondent cannot accept the question stated by Petitioner because it is based upon an erroneous factual statement that Petitioner was "summarily adjudicated in criminal contempt of court on a preponderance of the evidence rather than on evidence which established his guilt beyond a reasonable doubt..." (Petitioner's Statement of Question Presented for Review, page i).

The foregoing underlined words are unsupported by the record. The trial court, in holding the Petitioner (an attorney) in contempt of court on two occasions during the same criminal trial and imposing summary punishment at the times of such occurences for words and

conduct completely within the presence of the Court, did not state upon what weight of evidence he based his judgments. Although the Court of Appeals of Georgia did state, on direct appeal by the attorney, in Farmer v. Holton, 146 Ga. App. 102, 245 S.E. 2d 457 (1978), with reference to a finding of criminal contempt that "a preponderance of evidence is sufficient to convict the defendant, as against the requirement of removal of any reasonable doubt which prevails in criminal cases" (146 Ga. App. at 108), that Court also added "the cases here present criminal contempt clearly and beyond a reasonable doubt." (146 Ga. App. at 109). This Honorable Court denied certiorari in Farmer v. Holton, 440 U.S. 958, 995, Ct. 1499, 59 L.Ed. 2d 771 (1979).

In federal habeas corpus action, the unreported decision of Chief United States District Judge Anthony Alaimo, Southern District of Georgia, denying relief in Farmer v. Strickland, C.A. 579-19 (D.C., S.D.Ga.) (reproduced by Petitioner on pages 57a - 66a of his Petition for Writ of Certiorari), held, in part:

"The record does not, however, disclose that the trial judge found Farmer guilty merely from a preponderance of the evidence." (Petition, page 61a).

In like manner, the United States Court of Appeals for the Fifth Circuit, in Farmer v. Strickland, 5 Cir. 1981, 652 F.2d 427 at 434 (reproduced by Petitioner at pages 1a-54a), in affirming the denial of habeas corpus, said, in part:

"In his formal orders citing Farmer for criminal contempt, Judge Holton made no reference to any evidentiary standard."

II. RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Therefore, we will restate the question presented for review as follows:

"Whether the Georgia trial court erred in summarily adjudicating Petitioner (an attorney) in contempt of court twice for contumacious conduct committed entirely in the presence of the court and in its immediate view, without applying any evidentiary standard of proof to such courtroom conduct which was factually undisputed, and deciding as a matter of law that such conduct amounted to criminal contempt of court."

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. 81-1122

MILLARD C. FARMER, JR.,

Petitioner,

v.

NOAH J. STRICKLAND, Sheriff of
Pierce County, Georgia,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT, UNIT B

BRIEF IN OPPOSITION FOR THE RESPONDENT

STATEMENT OF THE CASE

Petitioner is a criminal defense lawyer who in 1977 was representing

convicted murderer George Street, whose death sentence had been vacated by the United States Supreme Court, Street v. Georgia, 429 U.S. 995, 97 S.Ct. 520, 50 L.Ed.2d 606 (1976), and whose case had been remanded for resentencing to the Superior Court of Pierce County, Street v. State, 238 Ga. 376, 233 S.E.2d 344 (1977). The resentencing of Street included jury proceedings before the Honorable Elie L. Holton, Judge of the Pierce County Superior Court. Twice during the proceedings Judge Holton found Petitioner in criminal contempt of court and summarily sentenced him to one and three days respectively in the county jail, the sentences to be served consecutively, based entirely upon the words and conduct of Petitioner in open Court, in the presence and hearing of Judge Holton.

The two adjudications of contempt were affirmed by the Georgia Court of Appeals on May 4, 1978, Farmer v. Holton, 146 Ga. App. 102, 245 S.E.2d 457 (1978). The Supreme Court of Georgia denied certiorari on September 14, 1978. This Honorable Court then denied Petitioner's petition for writ of certiorari on March 19, 1979, Farmer v. Holton, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979). On March 28, 1979, the petitioner filed a petition for writ of habeas corpus, along with a motion for a stay of his four-day sentence pending appeal, with Chief United States District Court Judge Anthony Alaimo, Southern District of Georgia. After a hearing on the motion for the stay on April 2, 1979, the district court denied the motion on April 5. Petitioner was

arrested by Pierce County authorities on April 7 and served his four-day sentence. On August 18, 1979, the District Court denied his petition for writ of habeas corpus in an unreported opinion, which is reproduced verbatim in the Petition for Certiorari in this Court in the Appendix, Pages 57a-66a. Farmer v. Strickland, Sheriff, C.A. No. 579-19.

On August 3, 1981, the Fifth Circuit Court of Appeals, Unit B, unanimously affirmed the denial of habeas corpus relief by the District Court. Farmer v. Strickland, 5 Cir. 1981, 652 F.2d 427. In its opinion, the Fifth Circuit quoted verbatim the court proceedings in the State Court which resulted in the two adjudications of criminal contempt (652 F.2d at 429-433). Petitioner has also included the Fifth Circuit opinion in his Petition as

Appendix 1a-54a, the Court proceedings being set forth at App. 5a-15a, 16a-26a.

In deference to this Court's admonition in Rules 22.2 and 34.3 to keep a brief in opposition as short as possible, we will not again reproduce the State Court proceedings in its entirety but will merely refer to certain significant portions not highlighted by Petitioner, citing the page(s) of the Petitioner's Appendix on which they appear verbatim as (Pet. App. ____).

I. FIRST CONTEMPT

Although Petitioner stated that, "we will refer to our client George Street by his first name because that's an affectionate way that we feel about him" (Pet. App. 6a), Petitioner objected to the prosecuting attorney addressing

the defendant Street in the same manner. (Pet. App. 5a-15a). The trial Court, in overruling the objection, noted it in the record (Pet. App. 7a), allowed Petitioner to have a continuing objection throughout the trial to the prosecutor's use of the defendant's first name (Pet. App. 10a, 13a, 14a), and asked Petitioner twice to let the cross-examination proceed (Pet. App. 14a).

Nevertheless, Petitioner persisted in his intemperate arguments, asking "to be heard," to "put up evidence", to "argue the motion", to "prepare a motion", to "make an offer of proof", to "confer with my client", to "advise my client"; asking "when may I make an objection?" and stating "we're not going to have it" (a double standard), (Pet. App. 6a-15a), thus bringing the trial to a standstill. At one point, Petitioner

asked the trial Judge, "Your Honor, do you object to me calling you Elie?" (Pet. App. 13a). The Court finally adjudged him in contempt and sentenced him to one day in the county jail. (Pet. App. 15a).

It should be noted that Petitioner attempts to explain in his Petition that when he said in open Court that he addressed his client by his first name, he meant that was how he addressed him in private conversations. However, he admits that the Fifth Circuit rejected this contention, pointing out that in oral argument Petitioner's counsel admitted that Petitioner referred to his client by his first name, and that the Defendant George Street in a deposition testified that Petitioner called him by his first name "during the trial" (See Petition, pps. 6-7, footnote 4).

II. SECOND CONTEMPT

This occurred during voir dire in jury selection. Petitioner accused the Court of discriminating against his client "because he's black" (Pet. App. 17a); charged that racial prejudice was existing in the courtroom (Pet. App. 18a); charged that a pattern of discrimination had developed (Pet. App. 19a); accused the District Attorney of intimidating jurors (Pet. App. 21a, 22a;) charged the Court with continual discrimination in the way the Court was striking jurors (Pet. App. 26a); and finally charged that the Court wanted to "cover up" the racism "that's effecting (sic) these jurors and effecting (sic) Your Honor" (Pet. App. 27a-28a). The Court summarily held Petitioner in contempt and imposed a three day sentence,

to begin at the conclusion of the trial (Pet. App. 29a).

The Court once directed Petitioner to have a seat and not to "make any further remarks like that" (Pet. App. 26a). This was ignored by Petitioner.

Respondent respectfully submits that the continued contumacious conduct of Petitioner on both occasions made it impossible to continue the orderly, decorous conduct of the trial without imposing criminal contempt sanctions.

It is ironic to note that after all of Petitioner's charges of racism and discrimination, the jury imposed the most lenient possible sentence of life imprisonment to a previously convicted murderer, and the defendant George Street did not appeal. (See Farmer v. Strickland, 652 F.2d at 433, fn. 1.)

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner has reduced his grounds argued before the Fifth Circuit Court of Appeals to a single ground, i.e., that he, as an attorney, was deprived of due process of law by being summarily adjudicated in contempt of court on a preponderance of the evidence rather than on evidence which establishes his guilt beyond a reasonable doubt, according to the Georgia rule. This argument must fail, because it ignores the following factors:

I. EVERY REVIEWING COURT, STATE AND FEDERAL, HAS HELD THAT HIS CONDUCT IN OPEN COURT WAS CONTUMACIOUS AND UNJUSTIFIED UNDER HIS DUTY TO HIS CLIENT.

In Farmer v. Holton, 146 Ga. App. 102, 245 S.E.2d 457 (1978), the Court of Appeals of Georgia said on direct appeal, in part:

"...Here attorney Farmer, being an officer of the court and fully cognizant of the foregoing rule, needed no warning to cease persisting in his arguments in view of the rulings of the trial court. He needed no further protection for his client than an adequate record, which presumably was made. Even if the trial judge were in error in some of his rulings, and we do not so hold, it was the duty of counsel to abide by those rulings; and if any right of his client was violated, the remedy was by appeal with which counsel is thoroughly familiar."

* * * * * * *

"The cases here present criminal contempt clearly and beyond a reasonable doubt. Counsel's continuous disregard of the court's instructions, his question to the court, "do you object to me calling you Elie?," his verbal assault on the court charging it with malicious and arbitrary reasoning on rulings made during voir dire, and his assertion that the court would not allow him to inquire into "What the court...wants to cover up. And, that is the racism that exists that's affecting these jurors and affecting Your Honor..." were insulting, contemptuous, and contumacous. As shown by the record, and by virtue of the rules of law

stated and particularly Code Ann. § 24-3323, we are unable to say that the trial judge's adjudications of contempt were gross, erroneous or flagrant abuses of discretion. Having conducted himself as the record shows, counsel perforce must abide the consequences." (Emphasis added).

The Supreme Court of Georgia denied certiorari on September 14, 1978 (unreported) and this Court did likewise on March 19, 1979. Farmer v. Holton, 440 U.S. 958, 99 S.Ct. 1499, 59 L.Ed.2d 771 (1979).

The Chief United States District Court Judge, Southern District of Georgia, before whom the habeas corpus action was held, said in Farmer v. Strickland, C.A. 579-19 (unreported but contained in Pet. App. 57a-66a), in part:

"...Here, the convicting state court afforded petitioner the opportunity fully to assert the interests of his client by granting a continuing objection to the

conduct of the prosecutor which was the subject of petitioner's contemptuous words and conduct. Petitioner's continued objections and interruptions of the Court, and his direct affronts to the dignity and integrity of the Court, clearly could not be justified under petitioner's duty to his client." (Emphasis added)

* * * * * * *

"...Further, under Georgia law, Courts are empowered to inflict summary punishment for contempt in cases where contemptuous conduct occurs in the presence of the Court and obstructs the administration of justice as well as in cases where an officer of the Court disobeys or resists any lawful order, decree, or command of the Court Ga. Code Ann. § 24-105. In addition, attorneys are prohibited by Georgia law from 'ever attempt[ing] to argue or explain a case, after having been fully heard, and the opinion of the Court has been pronounced, on pain of being considered in contempt.' Ga. Code Ann. § 24-3323."

Finally, the Fifth Circuit Court of Appeals commented about Petitioner's courtroom behavior as follows, in Farmer

v. Strickland (652 F.2d at 435; Pet. App. 37a-39a):

> "While we certainly appreciate a lawyer's professional duty to safeguard the constitutional rights of his client, we think that Farmer exceeded the bounds of 'fearless, vigorous and effective' advocacy here in persisting in his objections and argument once the trial judge had ruled on the matter and had instructed Farmer not to 'make that objection again.' (Citing and quoting from Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952), omitted).
>
> * * * * * * *
>
> "Here, Farmer, in both instances, did more than simply vicariously assert his client's right to be tried in an atmosphere free from perceived racial discrimination. The appellant, a practicing attorney with significant courtroom experience, intentionally ignored the trial judge's instruction to desist from pursuing his argument further and also disregarded the judge's warning that continued argument on the matter would risk a contempt citation.
>
> Furthermore, Farmer's retort to the judge that, "do you object to me calling you Elie?" is the type of

> disrespectful, insulting behavior on the part of officers of the court that will not be countenanced in a court of law. We do not 'equate contempt with courage or insults with independence.' Sacher v. United States, 343 U.S. at 14. 72 S.Ct. at 457." (Emphasis Added).

The conduct of Petitioner clearly overstepped the outside boundaries of vigorous trial advocacy and, unless halted, would have brought the trial to complete standstill.

In United States v. Wilson, 421 U.S. 309, 44 L.Ed.2d 186, at 193, 95 S.Ct. 1802 (1975) this Court held:

> "The face-to-face refusal to comply with the court's order itself constituted an affront to the court, and when that kind of refusal disrupts and frustrates an ongoing proceeding, as it did here, summary contempt must be available to vindicate the authority of the court ..."

In Maness v. Meyers, 419 U.S. 449, 42 L.Ed.2d 574, at 583, 95 S.Ct. 584 (1975):

> "...once the court has ruled, counsel and others involved in the action must abide by the ruling and comply with the court's orders...."

II. WHERE ALL THE ACTS OF ALLEGEDLY CONTUMACIOUS CONDUCT OF A TRIAL ATTORNEY TAKE PLACE IN THE PRESENCE AND HEARING OF THE COURT, THE STANDARDS OF PROOF NECESSARY TO SUSTAIN SUMMARY CRIMINAL CONTEMPT SANCTIONS HAVE NO PRACTICAL RELEVANCE.

As the Fifth Circuit said, in Farmer v. Strickland, supra (652 F.2d at 434; Pet. App, 33a, 34a):

> [3] Farmer argues first that he was deprived of his fourteenth amendment due process rights because he was adjudicated in criminal contempt of court and sentenced to jail on a preponderance of the evidence standard of proof rather than on the basis of evidence which established his guilt beyond a reasonable doubt. In his formal orders citing Farmer for criminal contempt, Judge Holton

made no reference to any evidentiary standard. On appeal to the Court of Appeals of Georgia, that court held that Farmer's two cases 'present criminal contempt clearly and beyond a reasonable doubt.' (citation omitted)"

"...In our view, the concern over the constitutionally acceptable evidentiary standard to be applied to cases such as this is unfounded. Where the criminal contempt is committed totally in the presence of the judge, the several standards of proof have no practical relevance."

"In Farmer's case, the facts of his courtroom conduct are undisputed. The judge personally witnessed all of the conduct which was punished as contumacious. When the contempt occurs totally in the presence of the judge, there is no necessity for the production of evidence. Indeed, there is no burden of persuading the trier of fact as there is no fact finding process to be conducted. Where the contumacious conduct is committed in the presence of the court in the immediate view of the judge, it is unnecessary for the court to apply any evidentiary standard of proof in order to summarily hold the contemnor in contempt of court. In such cases, it is a question of law

> for the court to decide whether the courtroom conduct which is factually undisputed amounts to criminal contempt of court. Therefore, Farmer's first argument is without merit." (Emphasis added).

We respectfully submit this view is eminently correct. In another type of criminal contempt case, where the Court did not personally observe all of the allegedly contumacious conduct and had to evaluate the testimony of witnesses and weigh their credibility, the degree of proof necessary to support an adjudication of contempt might be important. That situation is simply not presented in this case.

III. THE TRIAL COURT DID NOT PROVOKE THE CONTUMACIOUS CONDUCT OF PETITIONER AND WAS FORCED TO TAKE SUMMARY CONTEMPT ACTION IN ORDER TO ASSURE THE CONTINUED ORDERLY PROGRESS OF THE TRIAL.

As the Fifth Circuit said "...the judge exhibited remarkable patience and

restraint considering the defiant, disruptive course of conduct followed by the attorney in this case... Clearly the state judge 'used the summary contempt power only as a last resort'". (Farmer v. Strickland, 652 F.2d at 439; Pet. App. 52a-53a). The District Court said that "A fair appraisal of the record supports the conclusion that summary adjudication was the only way the trial judge could secure an orderly, seemly, decorus trial" (Emphasis by the Court; Farmer v. Strickland, (Pet. App. at 64a).

This record does not reflect arbitrary, unreasonable rulings by a tyranical, overbearing judge which might have inflamed a zealous defense lawyer. On the contrary, it shows a patient and

considerate judge who was finally forced to resort to contempt action in order to retain control of the proceedings in his Court.

IV. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHY THIS HONORABLE COURT SHOULD REVIEW THIS CASE UNDER RULE 17

Contrary to Petitioner's assertions, there is nothing in the instant case to call for the exercise of this Court's discretion to grant review. The same issue, i.e., the constitutionally accepted evidentiary standard to be applied to criminal contempt adjudications, was one of those presented when this Honorable Court denied a writ of certiorari applied for in the direct appeal. Farmer v. Holton, supra, at 440 U.S. 958. Nothing new has been added in

the habeas corpus action, except two opinions of the Federal Courts below denying relief from the criminal contempt adjudications.

The facts of this case make it immaterial whether the trial Court applied the preponderance of the evidence standard or the guilt beyond a reasonable doubt standard in imposing summary criminal contempt punishment. He did not state which standard he applied. Everything occurred in the presence of the trial Court. There were no disputed facts on which the Court was required to rule. It was simply a question of law for the trial Court to decide whether the factually undisputed courtroom conduct of Petitioner amounted to criminal contempt of court. He held that it did and his determination has

been upheld by three reviewing Courts, State and Federal, and certiorari denied in the direct appeal by a fourth, the Supreme Court of Georgia.

As conceded by Petitioner, he has served his four days of imprisonment (Petition, page 5). He does not claim that he faces any other disciplinary action. Counsel for Respondent respectfully submit that nothing is at stake in this Petition for Writ of Certiorari except one attorney's disciplinary record. While no doubt important to him, the issue does not have the widespread importance to the body of federal law contemplated by Rule 17. In another case in the future, perhaps, where a Georgia attorney may be found in contempt of Court for words or actions not witnessed in whole by the presiding

Court, the weight of evidence necessary to support the adjudication of criminal contempt may become important. However, this is not that kind of case.

V. CONCLUSION

Respondent respectfully shows that there is no reason of sufficient importance for this Honorable Court to review this case and urges the Court to deny a writ of certiorari.

Respectfully,

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